Lawrence A. Lucas
801 Massey Building,
Washington, D. C.

Paul R. Ervin,
200 Law Building,
Charlotte, North Carolina.

Frank W. Sturges,
200 Law Building,
Charlotte, North Carolina.
Counsel for Petitioner.

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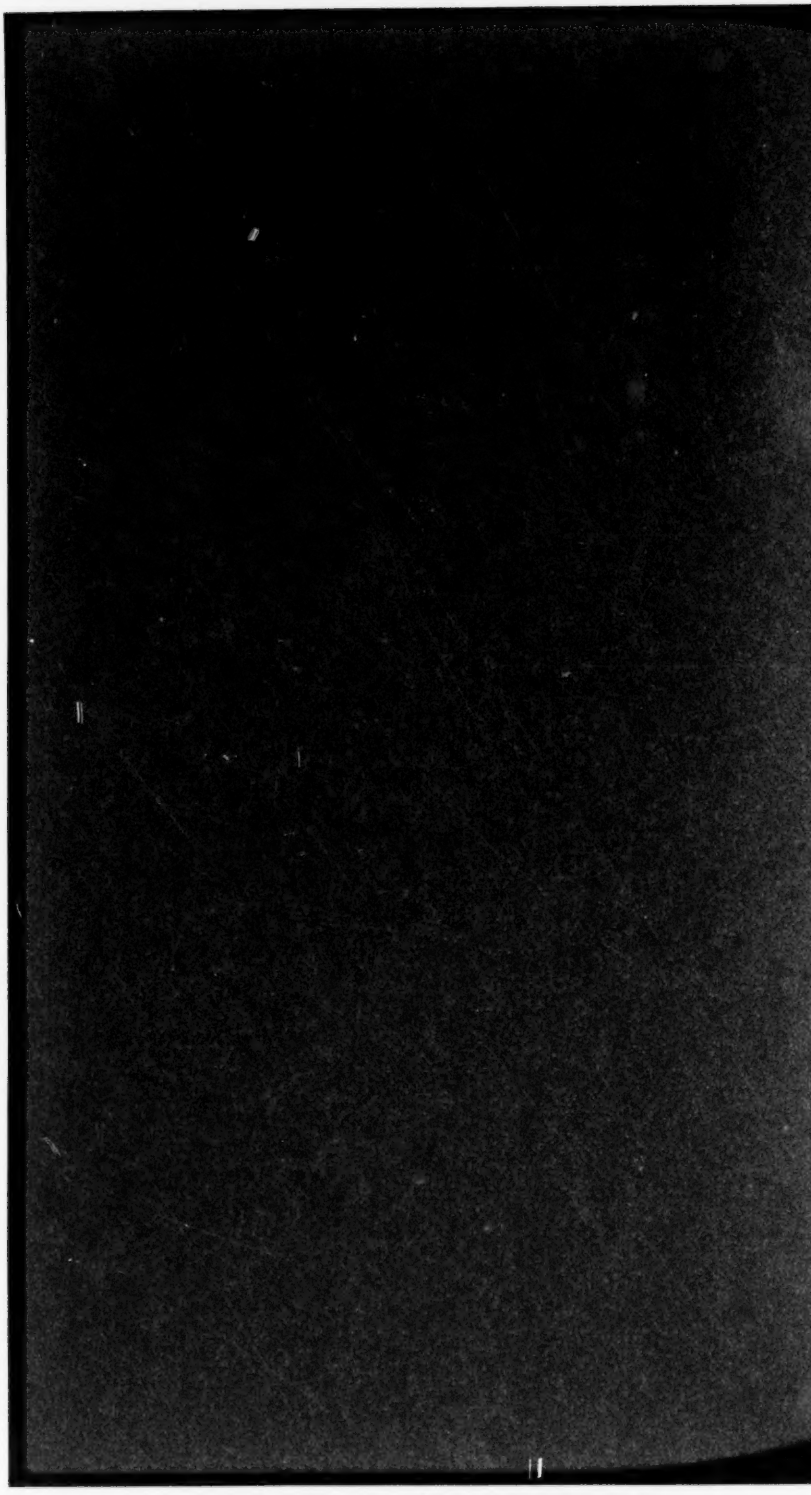

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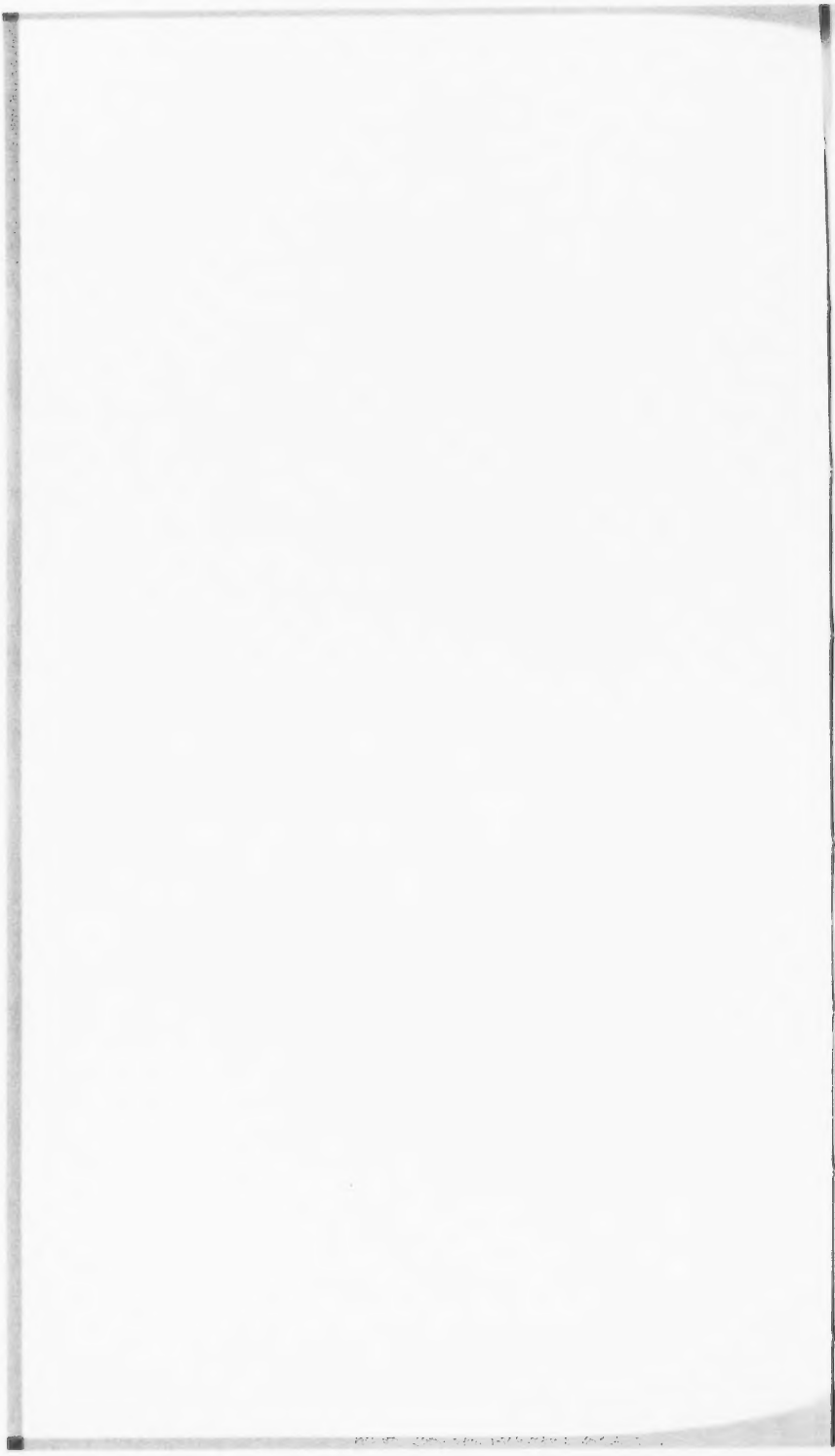

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 740

KEITH M. BEATY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

In reply to the brief of the United States in opposition to certiorari, the petitioner respectfully presents the following for the consideration of the Court:

I.

Respondent (Br. p. 4) sums up the petitioner's case under Points I, II and III of the Reasons for Granting the Writ as follows:

> "Petitioner contends (Pet. 3-4, 15-24) that his starting net worth was understated by the exclusion of cash on hand, that his ending net worth was overstated by the inclusion of inflated market values, that the trial court erroneously refused requested instructions on the net worth and expenditures theory of proof, that the Government failed to make a reasonable investigation of leads as to petitioner's starting net worth, that the trial court erred in permitting the jury to see charts which had not been

introduced into evidence, and that the Court of Appeals shifted the burden of proof to the taxpayer to explain the starting cash on hand and cash expenditures."

Respondent does not challenge the points raised by petitioner. The Government does not attempt to argue that the trial court was correct in the rulings on the issues involved. Respondent does not attempt to contest the proposition that in the light of the principles laid down by this Court in *Holland* v. *United States*, 75 S. Ct. 127; *Friedberg* v. *United States*, 75 S. Ct. 138; *United States* v. *Calderon*, 75 S. Ct. 186; and *Smith* v. *United States*, 75 S. Ct. 194, the trial court erred:

1. By admitting into evidence over the petitioner's objection, the discredited charts and testimony of the Government's agents, purporting to show the increase in the net worth of petitioner and expenditures in excess of reported income.

2. The error of the court in allowing the charts to remain before the jury throughout the entire trial over the objection of petitioner.

3. The error of the court in refusing to strike the patently erroneous testimony of the Government agents with respect to the net worth and expenditures of the petitioner.

4. The error of the court in allowing the charts to be taken into the jury room although they were not in evidence, and

5. The failure of the trial court to give the guarding instructions requested by petitioner with respect to net worth and expenditures computations.

Respondent (Br. 4) points to the remark of the trial court, "This is not a net worth case", but fails to refer

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to the admission by the trial court that the case involved "expenditures" (Original Transcript p. 2318-19).

The respondent bases its case (Br. p. 4) upon the shallow ground that:

> "* * * The admission of circumstantial evidence regarding petitioner's net worth increases and his cash disbursements was merely corroborative of the direct evidence upon which the Government placed reliance. * * *" (Br. p. 4)

This, we most respectfully urge, is a classic example of "begging the question". As is pointed out in the petition for certiorari (Pet. p. 26), the only evidence of record placing additional income in the hands of petitioner consisted of the expenditure and net worth charts and testimony of the Government agents. The independent evidence of the United States pointed to the sources from which petitioner could have acquired the monies which the Government sought to prove that he had by means of the net worth and expenditures evidence.

However, even if it could be said that the net worth and expenditure testimony and evidence was "merely corroborative", it was nevertheless highly prejudicial to the petitioner. The charts made such an impression upon the jury that the foreman asked for permission to take the charts into the jury room. This point has been entirely overlooked by the court below and by the respondent. The charts were allowed to remain before the jury throughout the entire trial and the jury's attention was continually directed to them. The jury received the full force and impact of the Agent Cline's discredited charts (not introduced in evidence) and his testimony. Under the rulings of the trial court and the decision of the court below, the jury was erroneously allowed to assume that the figures of the Government agents with

respect to net worth and expenditures were correct without an explanation by the taxpayer.

II.

Very recent decisions of the United States Court of Appeals for the Fifth Circuit have come to the attention of counsel since the filing of the petition for certiorari in this case.

In the petition (Point II, pp. 21-23) it was most respectfully urged that the decision of the court below was in direct conflict with the decision of the Fifth Circuit in *Dupree* v. *United States*, No. 14659, Prentice-Hall Tax Service 1955, Paragraph 73,382.

The Government considered the *Dupree* decision of such importance that it petitioned the Court for a rehearing. On April 15, 1955, the Court of Appeals promulgated an opinion reaffirming its decision, denying the Government's motion for rehearing and concluding:

• • • •

> "We do not believe this case either in the adequacy of proof as to the starting available funds in January, 1946, or in the clarity of the charge, meets the standards implicit in this pronouncement of the Supreme Court."

C. A. Dupree v. *United States* (CA5), April 15, 1955.

Prentice-Hall Tax Service 1955, Paragraph 72,612.

The petition for certiorari herein, at page 4, submits the following question for consideration:

> "5. Did the court below err in approving the action of the district court in allowing the obviously incorrect expenditure and net worth charts prepared by the government agents to remain before the jury throughout the trial and in permitting the jury to take these charts into the jury room with them, al-

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though the charts had not been admitted in evidence?"

With respect to that question, petitioner respectfully calls to the attention of this Court the case of *Joe R. Steele* v. *United States* (United States Court of Appeals, Fifth Circuit, No. 15187, May 13, 1955), Paragraph 72,696, Prentice-Hall Federal Tax Service 1955, which is in direct conflict with the holding of the court below in the instant case. In *Steele*, a Government agent prepared a computation of defendant's income on a net worth basis and on an expenditures basis. Although the computations purported to include all of the evidence of the Government's witnesses, there were omissions and discrepancies between the record and the exhibits. The Court held that it was error to permit the jury to take these exhibits to the jury room and consider them. The Court said:

* * * *

"As to the second portion of the first specification, the sending of such exhibits to the jury at the request of the District Attorney after the jury had retired and while it was in the jury room considering its verdict, we agree with appellant that the jury could scarcely consider this act of the court other than as investing these exhibits with an air of credibility as demonstrative evidence over and above, and independent of, the evidence which they purported to summarize and embody, with the undoubted effect of completely erasing from the minds of the jury, as to the so-called exhibits, any therapeutic effect the charge to the jury that the exhibits were not original evidence and were not binding upon the jury was intended or calculated to have."

In the trial below, the charts herein were discredited by the Government's own testimony (Pet. p. 11). The charts were not introduced in evidence but the jury was permitted to see them and to take them into the jury room. (Pet. p. 11).

It is submitted that under the decision of this Court in *Holland* v. *United States*, supra, the conclusion reached in *Steele* v. *United States*, supra, is correct.

We think that the decision of the Fifth Circuit in *Harry H. Blumberg* v. *United States*, May 13, 1955, Paragraph 72,701, Prentice-Hall Federal Tax Service 1955, is in direct conflict with the decision of the court below and answers the argument of the Government herein that the expenditures and net worth evidence was introduced only for purpose of corroboration and therefore the principles enunciated by this Court in *Holland* v. *United States*, supra, should be ignored.

In the *Blumberg* case, the United States offered evidence of expenditures in the amount of $30,000 by the defendant and his wife although the Government case was based upon specific items of income.

The Court of Appeals said:

* * * *

"* * * With that evidence before the jury, and no corrective charge given in respect to it, there was no possibility of defendant's securing an unprejudiced consideration by the jury of his claim that the omissions were due to oversight rather than intention. In addition, with no instruction given them in the matter, the jury is bound to have thought that this money was additional income which had been concealed and not reported.

"The government points, as precluding that conclusion, to a statement in the record made by it, that it was not claiming that this was additional income because it couldn't prove it. This staatement, however, when taken in connection with the argument of the United States Attorney about the wedding and the money spent, made the matter more greatly prejudicial because the jury, without adequate instruction, could well have taken it upon themselves to say, 'Well, whether the government can prove

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where it came from or not, we know it was hidden and unreported money, and we are going to convict the defendant because of it.' Subject to this objection, also, is the testimony that on that trip, part of the money that was taken up, $10,000, was loaned by the wife to defendant's brother-in-law.

"It was error to admit the evidence, it was error to refuse the charges, and for these errors the judgment must be reversed."

* * * *

And so here, whether the net worth and expenditure charts and evidence were introduced by the Government to place the money in Beaty's hands or, as the Government says, only for corroboration, the fact remains that the evidence was highly prejudicial, remained before the jury throughout the trial and was considered by the jury as vitally important, as is shown by the foreman's request to examine the charts.

This Court, on January 10, 1955, directed the court below to re-examine this case in the light of *Holland* v. *United States*, supra, and the other net worth cases decided December 6, 1955, pointing out that re-examination was desirable even in those cases "remotely" involving the principles laid down on December 6, 1954. (Opinion of court below, Appendix to petition, page 38.)

The opinion of the court below demonstrates that the net worth and expenditures issues herein were vital and that this was not a case which merely "remotely" involved the principles laid down by this Court on December 6, 1954. (See discussion by court below, Appendix to Petition, pp. 38, 39, 40.) However, the court below and respondent would discard the vital principles laid down by this Court on the ground that there was other independent evidence, overlooking completely the prejudicial nature of the net worth and expenditures evidence

which was made the subject of the Agent Cline's testimony and a substantial part of Agent Parrish' evidence.

Conclusion

Petitioner respectfully submits that this Honorable Court should grant the petition for certiorari.

Respectfully submitted,

LLEWELLYN A. LUCE
937 Munsey Building,
Washington, D. C.

PAUL R. ERVIN,
200 Law Building,
Charlotte, North Carolina.

FRANK W. SNEPP,
200 Law Building,
Charlotte, North Carolina.

Counsel for Petitioner.

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